

1
2 UNITED STATES DISTRICT COURT
3 DISTRICT OF NEVADA

4 DEMETRIUS LAMAR BROCK,

5 Petitioner,

6 v.

7 RENEE BAKER, *et al.*,

8 Respondents.
9

Case No. 3:20-cv-00220-LRH-CSD

ORDER

10
11 **I. INTRODUCTION**

12 This action is a petition for writ of habeas corpus by Demetrius Lamar Brock, an
13 individual incarcerated at Nevada's Lovelock Correctional Center. Brock is represented
14 by counsel. The case is before the Court for resolution of Brock's claims on their merits.
15 The Court will deny Brock's petition, will deny Brock a certificate of appealability, and
16 will direct the Clerk of the Court to enter judgment accordingly.

17 **II. BACKGROUND**

18 Brock was convicted in Nevada's Eighth Judicial District Court (Clark County),
19 after a jury trial, of second-degree murder with use of a deadly weapon and carrying a
20 concealed firearm or other deadly weapon. His convictions resulted from the murder of
21 his neighbor, Tyrollia Belt, in Las Vegas, on November 5, 2012. He is serving a
22 sentence of life in prison with minimum parole eligibility of ten years, plus a consecutive
23 term of life with minimum parole eligibility of eight years, on the murder conviction, and
24 a consecutive term of 36 months with minimum parole eligibility of twelve months on the
25 conviction of carrying a concealed firearm or other deadly weapon.

26 In its order on Brock's direct appeal, the Nevada Court of Appeals described the
27 factual background of the case as follows:
28

1 The jury heard testimony Brock approached the victim around 6:00
2 or 6:30 p.m. and told him to stop slamming his apartment door. The two
3 engaged in a heated argument that lasted about 10 to 20 minutes, after
4 which the victim left the apartment complex with his wife and Brock
discussed the incident with an apartment courtesy patrol officer. Later,
sometime after 8:30 p.m., Brock encountered the victim in the apartment
complex's parking lot and the two began to argue again.

5 Brock was carrying his handgun in a fanny pack and the handgun
6 was not visible to the victim. Brock removed the handgun from the fanny
7 pack and moved towards the victim while shooting. Brock shot the victim
8 in the head and the chest, and he continued to shoot after the victim had
fallen. The forensic evidence showed Brock fired a total of 15 rounds while
moving towards the victim and upwards of 5 of these rounds were fired
into the victim as he lie dying on the ground.

9 Order of Affirmance, Exh. 63, pp. 1–2 (ECF No. 22-17, pp. 2–3).

10 On December 12, 2013, Brock was indicted by a grand jury and charged with
11 second-degree murder with use of a deadly weapon and carrying a concealed firearm
12 or other deadly weapon. See Transcript of Grand Jury Proceedings, Exh. 9, p. 70 (ECF
13 No. 18-9, p. 71). Brock's jury trial commenced on February 18, 2014, and it lasted four
14 days. See Court Minutes, Exh. 1, pp. 7–14 (ECF No. 18-1, pp. 8–15); Trial Transcripts,
15 Exhs. 22 (day 2), 23 (day 3), and 26 (day 4) (ECF Nos. 19-1, 20-1, 21-1). The jury found
16 Brock guilty of all charges: second-degree murder with use of a deadly weapon and
17 carrying a concealed firearm or other deadly weapon. Verdict, Exh. 27 (ECF No. 21-2).
18 The judgment of conviction was filed on September 24, 2014. Judgment of Conviction,
19 Exh. 32 (ECF No. 21-7).

20 Brock appealed. See Appellant's Opening Brief, Exh. 58 (ECF No. 22-12). The
21 Nevada Court of Appeals affirmed on April 20, 2016. Order of Affirmance, Exh. 63 (ECF
22 No. 22-17).

23 Brock then filed a petition for writ of habeas corpus in the state district court on
24 December 27, 2016. Petition for Writ of Habeas Corpus (Post-Conviction), Exh. 66
25 (ECF No. 22-20). Brock later filed a supplemental brief in support of that petition.
26 Supplemental Brief in Support of Petition, Exh. 69 (ECF No. 22-23). The state district
27 court granted Brock's motion to obtain an investigator and appointed an investigator for
28 him. See Motion for Authorization to Obtain Investigator, Exh. 68 (ECF No. 22-22);

1 Order for Appointment of Investigator, Exh. 73 (ECF No. 22-27). The court held an
2 evidentiary hearing on August 23, 2018. See Transcript of Evidentiary Hearing, Exh. 75
3 (ECF No. 23-1). At the conclusion of the evidentiary hearing, and after argument by
4 counsel, the judge stated he would deny Brock's petition. *Id.* at 67–68 (ECF No. 23-1,
5 pp. 68–69). The state district court filed a written order denying Brock's petition on
6 October 10, 2018. Findings of Fact, Conclusions of Law and Order, Exh. 84 (ECF No.
7 23-10). Brock appealed. See Appellant's Opening Brief, Exh. 92 (ECF No. 24-1);
8 Appellant's Reply Brief, Exh. 94 (ECF No. 24-3). The Nevada Supreme Court affirmed
9 on November 15, 2019. Order of Affirmance, Exh. 95 (ECF No. 24-4).

10 On April 9, 2020, Brock, represented by counsel, filed his habeas petition,
11 initiating this action (ECF No. 1). Brock's petition includes the following claims:

12 Ground 1: Brock's federal constitutional rights were violated because the
13 evidence adduced at trial was insufficient to support his convictions.

14 Ground 2: Brock's federal constitutional rights were violated on account of
15 ineffective assistance of his trial counsel because of his trial counsel's
"failure to introduce evidence of the deceased's violent past."

16 Ground 3: Brock's federal constitutional rights were violated on account of
17 ineffective assistance of his trial counsel because of his trial counsel's
"failure to properly notice an expert witness."

18 Ground 4: Brock's federal constitutional rights were violated on account of
19 ineffective assistance of his appellate counsel because of his appellate
20 counsel's "failure to raise on direct appeal that the district court improperly
precluded a percipient [witness's] statements articulating that Mr. Belt was
the probable aggressor."

21 Ground 5: Brock's federal constitutional rights were violated on account of
22 ineffective assistance of his trial and appellate counsel because of their
"failure to object to the State presenting testimony regarding the autopsy
from Dr. Lisa Gavin when she did not perform the autopsy."

23 Ground 6: Brock's federal constitutional rights were violated on account of
24 ineffective assistance of his trial counsel "based upon trial counsel's
closing wherein counsel conceded the defendant's guilt without the
25 defendant's consent."

26 Ground 7: Brock's federal constitutional rights were violated on account of
27 ineffective assistance of his trial and appellate counsel because of their
"failure to object and advise the jury not to consider unfounded prejudicial
28 character evidence."

Ground 8: Brock’s federal constitutional rights were violated on account of ineffective assistance of his trial and appellate counsel because of trial counsel’s “failure to object” and appellate counsel’s failure “to raise on appeal the district court’s giving of improper jury instructions.”

A. The Malice Instruction

B. The Premeditation and Deliberation Instruction

C. The Reasonable Doubt Instruction

D. The Equal and Exact Justice Instruction

Ground 9: “Mr. Brock is entitled to a reversal of his convictions based upon cumulative error.”

Petition for Writ of Habeas Corpus (ECF No. 25), pp. 15–47.

Respondents filed an answer on March 12, 2021 (ECF No. 17). Brock filed a reply on June 16, 2021 (ECF No. 29). Respondents filed a response to Brock’s reply on July 31, 2021 (ECF No. 34).

III. DISCUSSION

A. Standard of Review

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a federal court may not grant a petition for a writ of habeas corpus on any claim that was adjudicated on its merits in state court unless the state court decision was contrary to, or involved an unreasonable application of, clearly established federal law as determined by United States Supreme Court precedent, or was based on an unreasonable determination of the facts in light of the evidence presented in the state-court proceeding. See 28 U.S.C. § 2254(d). A state-court ruling is “contrary to” clearly established federal law if it either applies a rule that contradicts governing Supreme Court law or reaches a result that differs from the result the Supreme Court reached on “materially indistinguishable” facts. See *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). A state-court ruling is “an unreasonable application” of clearly established federal law under section 2254(d) if it correctly identifies the governing legal rule but unreasonably applies the rule to the facts of the case. See *Williams v. Taylor*, 529 U.S. 362, 407–08 (2000). To obtain federal habeas relief for such an “unreasonable

1 application,” however, a petitioner must show that the state court’s application of
2 Supreme Court precedent was “objectively unreasonable.” *Id.* at 409–10; *see also*
3 *Wiggins v. Smith*, 539 U.S. 510, 520–21 (2003). Or, in other words, habeas relief is
4 warranted, under the “unreasonable application” clause of section 2254(d), only if the
5 state court’s ruling was “so lacking in justification that there was an error well
6 understood and comprehended in existing law beyond any possibility for fairminded
7 disagreement.” *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

8 **B. Ground 1**

9 In Ground 1, Brock claims that his federal constitutional rights were violated
10 because the evidence adduced at trial was insufficient to support his convictions of
11 second-degree murder and carrying a concealed firearm or other deadly weapon.
12 Petition for Writ of Habeas Corpus (ECF No. 25), pp. 15–17.

13 Brock asserted this claim on his direct appeal. *See* Appellant’s Opening Brief,
14 Exh. 58, pp. 7–9 (ECF No. 22-12, pp. 11–13). The Nevada Court of Appeals ruled as
15 follows:

16 Appellant Demetrius Brock claims there was insufficient evidence to
17 support his convictions. He argues the evidence does not support the
18 finding of malice necessary for second-degree murder and his handgun
19 was not concealed. We review the evidence in the light most favorable to
20 the prosecution and determine whether “any rational trier of fact could
have found the essential elements of the crime beyond a reasonable
doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Mitchell v. State*,
124 Nev. 807, 816, 192 P.3d 721, 727 (2008).

21 The jury heard testimony Brock approached the victim around 6:00
22 or 6:30 p.m. and told him to stop slamming his apartment door. The two
23 engaged in a heated argument that lasted about 10 to 20 minutes, after
24 which the victim left the apartment complex with his wife and Brock
discussed the incident with an apartment courtesy patrol officer. Later,
sometime after 8:30 p.m., Brock encountered the victim in the apartment
complex’s parking lot and the two began to argue again.

25 Brock was carrying his handgun in a fanny pack and the handgun
26 was not visible to the victim. Brock removed the handgun from the fanny
27 pack and moved towards the victim while shooting. Brock shot the victim
28 in the head and the chest, and he continued to shoot after the victim had
fallen. The forensic evidence showed Brock fired a total of 15 rounds while
moving towards the victim and upwards of 5 of these rounds were fired
into the victim as he lie dying on the ground.

We conclude a rational juror could reasonably infer from this evidence Brock carried his handgun concealed upon his person and acted with malice when he shot and killed the victim. See NRS 200.010(1); NRS 200.020; NRS 200.030(2); NRS 202.350(1)(d)(4). It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. See *Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Order of Affirmance, Exh. 63, pp. 1–2 (ECF No. 22-17, pp. 2–3).

The Due Process Clause of the United States Constitution “protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364 (1970). “[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); see also *Payne v. Borg*, 982 F.2d 335, 338 (9th Cir. 1992). “[F]aced with a record of historical facts that supports conflicting inferences,” the court “must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.” *Jackson*, 443 U.S. at 326; see also *McDaniel v. Brown*, 558 U.S. 120, 133 (2010) (reaffirming *Jackson* standard). The Supreme Court has emphasized that claims of insufficiency of the evidence “face a high bar in federal habeas proceedings” *Coleman v. Johnson*, 566 U.S. 650, 651 (2012) (per curiam).

Furthermore, because this claim was raised in state court and was ruled upon by the Nevada Court of Appeals on Brock’s direct appeal, 28 U.S.C. § 2254(d) adds an additional layer of deference; to prevail on the claim, Brock must demonstrate that the state court’s ruling was an unreasonable application of the *Jackson* standard. See *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005).

Applying these standards, viewing the testimony at trial in its entirety in the light most favorable to the prosecution, the Court determines that this claim is without merit. There was ample evidence presented at trial upon which a rational trier of fact could have concluded that Brock acted with malice when he shot and killed Belt, and that

1 Brock carried a concealed firearm. See Trial Transcripts, Exhs. 22 (day 2), 23 (day 3),
2 and 26 (day 4) (ECF Nos. 19-1, 20-1, 21-1). The Nevada Court of Appeals' ruling on
3 this claim was not contrary to, or an unreasonable application of, *Jackson*, or any other
4 Supreme Court precedent. The Court will deny Brock habeas corpus relief on Ground 1.

5 **C. Ground 2**

6 In Ground 2, Brock claims that his federal constitutional rights were violated on
7 account of ineffective assistance of his trial counsel because of his trial counsel's
8 "failure to introduce evidence of the deceased's violent past." Petition for Writ of Habeas
9 Corpus (ECF No. 25), pp. 20–25.

10 In *Strickland v. Washington*, the Supreme Court propounded a two-prong test for
11 analysis of claims of ineffective assistance of counsel, requiring the petitioner to
12 demonstrate (1) that the attorney's "representation fell below an objective standard of
13 reasonableness," and (2) that the attorney's deficient performance prejudiced the
14 defendant such that "there is a reasonable probability that, but for counsel's
15 unprofessional errors, the result of the proceeding would have been different."
16 *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). A court considering a claim of
17 ineffective assistance of counsel must apply a "strong presumption that counsel's
18 conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.
19 The petitioner's burden is to show "that counsel made errors so serious that counsel
20 was not functioning as the 'counsel' guaranteed the defendant by the Sixth
21 Amendment." *Id.* at 687. To establish prejudice under *Strickland*, it is not enough for the
22 habeas petitioner "to show that the errors had some conceivable effect on the outcome
23 of the proceeding." *Id.* at 693. Rather, the errors must be "so serious as to deprive the
24 defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. Where a state court
25 previously adjudicated the claim of ineffective assistance of counsel under *Strickland*,
26 establishing that the decision was unreasonable is especially difficult. See *Harrington*,
27 562 U.S. at 104–05. In *Harrington*, the Supreme Court instructed that *Strickland* and
28 section 2254(d) are each highly deferential, and when the two apply in tandem, review

1 is doubly so. *Id.* at 105; see also *Cheney v. Washington*, 614 F.3d 987, 995 (9th Cir.
 2 2010) (“When a federal court reviews a state court’s *Strickland* determination under
 3 AEDPA, both AEDPA and *Strickland*’s deferential standards apply; hence, the Supreme
 4 Court’s description of the standard as doubly deferential.” (internal quotation marks
 5 omitted)). “When § 2254(d) applies, the question is not whether counsel’s actions were
 6 reasonable. The question is whether there is any reasonable argument that counsel
 7 satisfied *Strickland*’s deferential standard.” *Harrington*, 562 U.S. at 105.

8 Brock asserted this claim of ineffective assistance of counsel on the appeal in his
 9 state habeas action. See Appellant’s Opening Brief, Exh. 92, pp. 20–26 (ECF No. 24-1,
 10 pp. 30–36). The Nevada Supreme Court ruled as follows:

11 ... Brock argues that counsel should have introduced evidence of
 12 the victim’s child abuse convictions to prove he was the likely aggressor
 13 and support Brock’s claim of self-defense. We conclude that counsel was
 14 not deficient. A defendant may “present evidence of a victim’s character
 15 when it tends to prove that the victim was the likely aggressor,” however,
 16 he may not prove that character evidence with specific instances of
 17 conduct. *Daniel v. State*, 119 Nev. 498, 514, 78 P.3d 890, 901 (2003); see
 18 NRS 48.055(1). While a defendant may introduce specific acts of violence
 19 if he was aware of those acts, *Daniel*, 119 Nev. at 515, 78 P.3d at 902, the
 20 record does not indicate that Brock was aware of any prior violent conduct
 21 by the victim. Therefore, the district court did not err in denying this claim.
 22 [Footnote: The district court erroneously concluded counsel was deficient,
 23 but denied the claim because Brock did not show prejudice. We conclude
 24 that the district court reached the correct result in denying this claim. See
 25 *Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970).]

26 Order of Affirmance, Exh. 95, p. 2 (ECF No. 24-4, p. 3).

27 The Nevada Supreme Court’s determination that the evidence that Brock
 28 believes his trial counsel should have proffered at trial would have been inadmissible
 29 was based purely on the Nevada Supreme Court’s interpretation of Nevada law. That
 30 aspect of the Nevada Supreme Court’s ruling is authoritative and beyond the scope of
 31 this federal habeas action. See *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991).

32 Given, then, that the subject evidence—the evidence of Belt’s child abuse
 33 convictions—was inadmissible under state law, the Nevada Supreme reasonably ruled,
 34 applying *Strickland*, that Brock’s trial counsel did not act unreasonably in not offering the
 35 evidence. Moreover, Brock was not prejudiced by his trial counsel’s failure to offer

1 inadmissible evidence. The Nevada Supreme Court's ruling on this claim was not
 2 contrary to, or an unreasonable application of, *Strickland*, or any other Supreme Court
 3 precedent. The Court will deny Brock habeas corpus relief on Ground 2.

4 **D. Ground 3**

5 In Ground 3, Brock claims that his federal constitutional rights were violated on
 6 account of ineffective assistance of his trial counsel because of his trial counsel's
 7 "failure to properly notice an expert witness." Petition for Writ of Habeas Corpus (ECF
 8 No. 25), pp. 25–27.

9 Brock asserted this claim on the appeal in his state habeas action. See
 10 Appellant's Opening Brief, Exh. 92, pp. 26–28 (ECF No. 24-1, pp. 36–38). The Nevada
 11 Supreme Court ruled as follows:

12 ... Brock argues that counsel should have noticed potential firearm
 13 expert testimony. However, Brock did not identify the testimony he hoped
 14 to elicit from an expert or describe how it would affect his trial. See
 15 *Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).
 16 Therefore, the district court did not err in denying this claim.

17 Order of Affirmance, Exh. 95, p. 2 (ECF No. 24-4, p. 3).

18 The Nevada Supreme Court's ruling was reasonable. With respect to the
 19 prejudice prong of the *Strickland* standard, Brock's claim is completely insubstantial.
 20 Brock makes no showing what testimony an expert witness could have provided. See
 21 *Wildman v. Johnson*, 261 F.3d 832, 839 (9th Cir. 2001) (mere speculation that an expert
 22 could have been found to testify at trial is not sufficient to establish prejudice); *Grisby v.*
 23 *Blodgett*, 130 F.3d 365, 373 (9th Cir. 1997) ("Grisby has failed to establish how expert
 24 testimony would have raised a 'reasonable probability' that the outcome of the trial
 25 would have been different. Speculation about what an expert could have said is not
 26 enough to establish prejudice."). The Court will deny Brock habeas corpus relief on
 27 Ground 3.

28 **E. Ground 4**

In Ground 4, Brock claims that his federal constitutional rights were violated on
 account of ineffective assistance of his appellate counsel because of his appellate

counsel's "failure to raise on direct appeal that the district court improperly precluded a percipient [witness's] statements articulating that Mr. Belt was the probable aggressor." Petition for Writ of Habeas Corpus (ECF No. 25), pp. 28–30.

Brock asserted this claim on the appeal in his state habeas action. See Appellant's Opening Brief, Exh. 92, pp. 28–31 (ECF No. 24-1, pp. 38–41). The Nevada Supreme Court ruled as follows:

... Brock argues that appellate counsel should have challenged a district court ruling precluding a witness's opinion that the victim was responsible for the altercation during which he was shot. Brock asserts that it was admissible as a present sense impression. We disagree. The declaration was a statement provided to police which was not made at the time the witness perceived the shooting or immediately thereafter. See NRS 51.085. Additionally, it was the witness's opinion about the victim's blame and not a description of the event. *Id.* Therefore, Brock failed to demonstrate that appellate counsel neglected to raise a meritorious claim.

Order of Affirmance, Exh. 95, pp. 2–3 (ECF No. 24-4, pp. 3–4).

The Nevada Supreme Court's ruling regarding the evidentiary issue at the heart of this claim was based purely on the Nevada Supreme Court's interpretation of Nevada law, and that aspect of the Nevada Supreme Court's ruling is authoritative and beyond the scope of this federal habeas action. See *Estelle*, 502 U.S. at 67–68. Therefore, given that the Nevada Supreme Court ruled that the trial court's evidentiary ruling was correct under Nevada law, it inevitably follows that Brock's appellate counsel did not perform deficiently in not raising the issue on Brock's direct appeal, and Brock was not prejudiced. The Nevada Supreme Court reasonably denied relief on this claim. The Nevada Supreme Court's ruling was not contrary to, or an unreasonable application of, *Strickland*, or any other Supreme Court precedent. The Court will deny Brock habeas corpus relief on Ground 4.

F. Ground 5

In Ground 5, Brock claims that his federal constitutional rights were violated on account of ineffective assistance of his trial and appellate counsel because of their "failure to object to the State presenting testimony regarding the autopsy from Dr. Lisa Gavin when she did not perform the autopsy." Petition for Writ of Habeas Corpus (ECF

No. 25), pp. 30–34. More specifically, Brock claims that his constitutional right of confrontation under the Sixth and Fourteenth Amendments was violated because the trial court allowed the expert testimony of Dr. Lisa Gavin. Dr. Gavin’s testimony was based in part on, and she drew conclusions in part from, an autopsy performed by another doctor, Dr. Gary Telgenhoff. See *id.* Brock cites *Crawford v. Washington*, 541 U.S. 36 (2004); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); and *Bullcoming v. New Mexico*, 564 U.S. 647 (2011) in support of his contention that there was a confrontation clause violation. See *id.* Brock claims that his trial counsel was ineffective for not objecting, and he claims that his appellate counsel was ineffective for not raising this issue on his direct appeal. See *id.*

Brock asserted this claim on the appeal in his state habeas action. See Appellant’s Opening Brief, Exh. 92, pp. 31–37 (ECF No. 24-1, pp. 41–47). The Nevada Supreme Court ruled as follows:

... Brock argues that trial and appellate counsel should have challenged the medical examiner’s testimony about the autopsy as she did not perform the autopsy, thus violating *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) and *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). Brock did not demonstrate deficient performance or prejudice. The testifying medical examiner gave her independent expert opinion based on the autopsy report and photographs and did not violate the Confrontation Clause because her judgment and methods were subject to cross-examination. See *Vega v. State*, 126 Nev. 332, 340, 236 P.3d 632, 638 (2010). As a Confrontation Clause claim would have failed, trial and appellate counsel were not deficient in declining to raise a futile objection or argument. See *Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Therefore, the district court did not err in denying this claim.

Order of Affirmance, Exh. 95, p. 3 (ECF No. 24-4, p. 4).

The Confrontation Clause of the Sixth Amendment, applicable in state court by virtue of the Fourteenth Amendment, provides: “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” U.S. Const. amend. VI; *Pointer v. Texas*, 380 U.S. 400, 403 (1965). The Confrontation Clause bars “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” *Crawford*, 541 U.S. at 53–54. The range of testimonial statements to

1 which the Confrontation Clause applies includes a statement “made under
2 circumstances which would lead an objective witness reasonably to believe that the
3 statement would be available for use at a later trial.” See *id.* at 52. The Confrontation
4 Clause applies to reports of forensic analyses. See *Melendez-Diaz*, 557 U.S. at 315–24.
5 And, the Confrontation Clause applies where a forensic analysis was performed, and
6 the report of the analysis was produced, by one expert, and is presented in court
7 through the testimony of a different expert. See *Bullcoming*, 564 U.S. at 657–63.

8 However, Brock’s claim raises the question whether the autopsy report is a
9 testimonial statement within the meaning of *Crawford*, *Melendez-Diaz*, and *Bullcoming*.
10 Brock cites an opinion of the Eleventh Circuit Court of Appeals and an opinion of the
11 District of Columbia Court of Appeals for the proposition that autopsy reports are
12 testimonial statements. See Petition for Writ of Habeas Corpus (ECF No. 25), pp. 32–
13 33, citing *United States v. Ignasiak*, 667 F.3d 1217, 1231–32 (11th Cir. 2012), and
14 *United States v. Moore*, 651 F.3d 30, 73 (D.C. Cir. 2011) (per curium), aff’d in part,
15 *Smith v. United States*, 133 S. Ct. 714 (2013). Brock also cites the rulings of state
16 courts to the same effect. See *id.* at 33. Brock does not cite any Supreme Court
17 precedent for this proposition. See *id.* at 30–34; see also Reply (ECF No. 29), p. 13.

18 The United States Supreme Court has never ruled that autopsy reports are
19 testimonial within the meaning of *Crawford*, *Melendez-Diaz*, and *Bullcoming*. Because
20 the United States Supreme Court has not, and had not at the time of the Nevada
21 Supreme Court’s ruling, established that autopsy reports are testimonial, the Nevada
22 Supreme Court’s ruling cannot be considered contrary to, or an unreasonable
23 application of, clearly established law as determined by the United States Supreme
24 Court. See 28 U.S.C. § 2254(d); *Carey v. Musladin*, 549 U.S. 70, 77 (2006) (“Given the
25 lack of holdings from this Court ..., it cannot be said that the state court ‘unreasonabl[y]
26 appli[ed] clearly established Federal law.” (quoting 28 U.S.C. § 2254(d))); see also
27 *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (§ 2254(d)’s “backward-looking language
28

1 requires an examination of the state-court decision at the time it was made” (quoting
2 *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011))).

3 Because Brock does not show that the Nevada Supreme Court misapplied
4 clearly established United States Supreme Court precedent in determining that there
5 was no Confrontation Clause violation, it follows that Brock does not show that the
6 Nevada Supreme Court unreasonably ruled that his trial and appellate counsel
7 performed inadequately with respect to the issue, or that he was prejudiced, as required
8 under *Strickland*.

9 This Court, then, determines that the Nevada Supreme Court’s denial of relief on
10 this claim was not contrary to, or an unreasonable application of, *Strickland*, *Crawford*,
11 *Melendez-Diaz*, *Bullcoming*, or any other Supreme Court precedent. The Court will deny
12 Brock habeas corpus relief on Ground 5.

13 **G. Ground 6**

14 In Ground 6, Brock claims that his federal constitutional rights were violated on
15 account of ineffective assistance of his trial counsel “based upon trial counsel’s closing
16 wherein counsel conceded the defendant’s guilt without the defendant’s consent.”
17 Petition for Writ of Habeas Corpus (ECF No. 25), pp. 34–38.

18 In context, the argument of Brock’s trial counsel, in closing argument, that is the
19 subject of this claim, is as follows:

20 Now, second degree murder is any murder that’s not first degree.
21 So if you believe a murder was committed, and you’ll have the
22 instructions, and it was premeditated and it was deliberate and all of the
23 elements were there, then it’s first degree murder. If you think all of those
24 elements aren’t there, it’s still murder, it’s second degree murder. But if
25 you think that, well, no, that just – that’s really not correct, that’s not what
26 really happened, the next choice you have is voluntary manslaughter.
27 Voluntary manslaughter is basically in between first degree murder and
28 self-defense, somewhere in between.

25 For the sudden violent impulse of passion to be irresistible resulting
26 in a killing which is voluntary manslaughter, there must not have been an
27 interval between the assault or provocation and the killing sufficient for the
28 voice of reason and humanity to be heard. There was no time. Mr. Brock
was confronted. He shot his 15 shots. Within three to five seconds there
was no time. This was not a time for [quiet] reflection. This was a time for
action. This was a time for self-protection.

1 But if you don't think that this is a self-defense case, I would submit
2 to you it has to be voluntary manslaughter. It's not first degree. There's no
3 way it's first degree. Could you come up with second degree the way you
4 look at it? I guess. The two—the two things in the middle, second
5 degree murder or voluntary manslaughter, if you get rid of the two that
6 are farthest apart, that's where your deliberation lies. And if that's where
7 you are, if you haven't considered or you don't think it's self-defense
8 because of the provocation, because of the situation, because of what
9 happened, it would seem like this is a voluntary manslaughter case.

6 Trial Transcript, Exh. 26 (day 4), pp. 110–11 (ECF No. 21-1, pp. 111–12).

7 Brock asserted this claim on the appeal in his state habeas action. See
8 Appellant's Opening Brief, Exh. 92, pp. 37–43 (ECF No. 24-1, pp. 47–53). The Nevada
9 Supreme Court ruled as follows:

10 ... Brock asserts that trial counsel improperly conceded his guilt
11 during closing argument. Brock fails to demonstrate that counsel's
12 decision was unreasonable. Counsel argued that Brock acted in self-
13 defense and, alternatively, his actions constituted second-degree murder
14 or voluntary manslaughter as opposed to first-degree murder. This
15 strategy is entitled to deference and was reasonable under the
16 circumstances. See *Armenta-Carpio v. State*, 129 Nev. 531, 535–36, 306
17 P.3d 395, 398–99 (2013) (recognizing that "[a] concession of guilt is
18 simply a trial strategy—no different than any other strategy the defense
19 might employ at trial" and counsel's decision should be reviewed for
20 reasonableness); *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278,
21 280–81 (1996) (observing that strategic decisions are virtually
22 unchallengeable under most circumstances). *But cf. Jones v. State*, 110
23 Nev. 730, 738, 877 P.2d 1052, 1057 (1994) (concluding that counsel's
24 concession of guilt was improper where it contradicted defendant's
25 testimony). Given the evidence against him, Brock failed to demonstrate a
26 reasonable probability of a different outcome at trial had counsel not made
27 the challenged argument. Brock and the victim argued on the day of the
28 shooting. Although security responded to the argument, Brock did not
want police called, suggesting he did not consider the victim threatening.
The victim was unarmed and was talking on the phone to his girlfriend
when the shooting began. Brock shot at the victim 15 times, emptying his
weapon. Eight shots struck the victim and the trajectory of some of the
wounds and physical evidence at the scene suggested that Brock
advanced toward the victim and continued to shoot him after he fell.
Therefore, the district court did not err in denying this claim.

24 Order of Affirmance, Exh. 95, pp. 3–4 (ECF No. 24-4, pp. 4–5).

25 Brock does not show the Nevada Supreme Court's ruling to be contrary to, or an
26 unreasonable application of, Supreme Court precedent. The only Supreme Court cases
27 cited by Brock are: *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v.*
28

1 *Cronic*, 466 U.S. 648 (1984); and *Florida v. Nixon*, 543 U.S. 175 (2004). See Petition for
2 Writ of Habeas Corpus (ECF No. 25), pp. 34–38; Reply (ECF No. 29), pp. 13–14.

3 Brock does not in this Court, and he did not in state court, cite *McCoy v.*
4 *Louisiana*, 138 S.Ct. 1500 (2018), in which the Supreme Court held it is structural error
5 if defense counsel concedes guilt over the defendant’s express objection—perhaps
6 because Brock does not allege, or offer any evidence to show, that he expressly
7 objected to his counsel’s argument. See Petition for Writ of Habeas Corpus (ECF No.
8 25), pp. 34–38; see also Appellant’s Opening Brief, Exh. 92, pp. 37–43 (ECF No. 24-1,
9 pp. 47–53).

10 Brock cites *Strickland* only regarding the general requirements for establishing a
11 claim of ineffective assistance of counsel. See Petition for Writ of Habeas Corpus (ECF
12 No. 25), p. 35; Reply (ECF No. 29), p. 14.

13 Regarding Brock’s reliance on *Nixon*, the Nevada Supreme Court’s ruling was
14 not inconsistent with that holding. In fact, the holding in *Nixon*, generally tends to
15 support the Nevada Supreme Court’s ruling, as it illustrates that a concession, in the
16 absence of express approval or objection from the client, may under some
17 circumstances be reasonable. See *Nixon*, 543 U.S. at 187–92.

18 Brock cites *Cronic* for the proposition that “[t]he right to the effective assistance of
19 counsel is thus the right of the accused to require the prosecution’s case to survive the
20 crucible of meaningful adversarial testing.” See Petition for Writ of Habeas Corpus (ECF
21 No. 25), p. 35; see also *Cronic*, 466 U.S. at 656. As the Court understands it, the point
22 of Brock’s citation of *Cronic* is that, if the attorney error alleged in this claim is like that in
23 *Cronic*—complete failure of counsel to function as the client’s advocate—there would be
24 a presumption that Brock was prejudiced. But, in this case, Brock’s counsel did not
25 cease to function as his advocate in making the argument Brock complains about.

26 In fact, in this Court’s view, Brock’s counsel’s argument was not a concession of
27 guilt at all, and it certainly was not a concession that had any impact on the jury’s
28 verdict. In its closing argument, the prosecution argued: “[T]he defendant doesn’t argue

1 that this was voluntary manslaughter. He argues it was self-defense and that's it. So
2 let's talk about why this is not self-defense." Trial Transcript, Exh. 26 (day 4), p. 87 (ECF
3 No. 21-1, p. 88). Brock's counsel apparently responded to that argument when he
4 argued that, if the jury did not find self-defense, it should find voluntary manslaughter
5 rather than murder. Brock's counsel did not concede that Brock did not act in self-
6 defense. Brock's counsel said nothing to undermine Brock's assertion that he acted in
7 self-defense. See, e.g., Trial Transcript, Exh. 26 (day 4), pp. 107, 118 (ECF No. 21-1,
8 pp. 108, 119) (defense counsel arguing self-defense). Nor did defense counsel concede
9 any fact necessary to the jury's finding of second-degree murder. There was no issue at
10 trial as to whether Brock shot and killed Belt; it undisputed that he had. Trial counsel's
11 argument was simply that if the jury did not find that Brock acted in self-defense, the jury
12 should not find that Brock acted with the malice necessary for murder. That was a
13 reasonable alternative argument, and the Nevada Supreme Court's ruling to that effect
14 was itself reasonable.

15 Brock has not shown the Nevada Supreme Court's ruling to be contrary to, or an
16 unreasonable application of, *Strickland*, *Nixon*, or any other Supreme Court precedent.
17 The Court will deny Brock habeas corpus relief on Ground 6.

18 **H. Ground 7**

19 In Ground 7, Brock claims that his federal constitutional rights were violated on
20 account of ineffective assistance of his trial and appellate counsel because of their
21 "failure to object and advise the jury not to consider unfounded prejudicial character
22 evidence." Petition for Writ of Habeas Corpus (ECF No. 25), pp. 38–42.

23 The evidence that Brock refers to in this claim was a comment made by
24 prosecution witness Bryan Carbone, the courtesy patrol officer at the apartments where
25 Belt was killed. The following was Carbone's testimony on direct examination about a
26 conversation Carbone had with Brock between the time of Brock's first confrontation
27 with Belt and the time of the shooting:
28

1 Q. What was his demeanor like when you made contact with
him at that time?

2 A. Over confident. He just would not stop repeating himself.

3 Q. So would you—he's very repetitive. Would you
4 say he was frustrated or what do you mean by "over confident"?

5 A. Over confident, there was no hostility. No signs of emotional
problems. No nothing. It was just him repeating himself.

6 Q. What was the first thing he said to you?

7 A. He--he 's a military law enforcement professional. Something
8 about his tattoos. I—I couldn't make any sense of it. He progressed or
went onto the—what happened with him and Mr. Belt at the time.

9 Q. What did he tell you happened?

10 A. He claimed that Mr. Brock approached Mr. Belt in a talkative
11 fashion about stop slamming the door.

12 Q. Okay.

13 A. Then he claimed that Mr. Belt came back with a hostile,
aggressive, threatening bully-type affect, but he did not identify whether
14 the threatening was verbal or physical.

15 Q. Did you ask him?

16 A. Yes, ma'am.

17 Q. Okay. And he couldn't—he couldn't verbalize anything?

18 A. No.

19 Q. Did you ask him if you should call the cops?

20 A. Yes. Later I asked, Should I call the cops upon any mention
of threat. He replied with, no, he does not want to look like a punk in front
21 of the cops.

22 Q. Okay. And this is the Defendant saying he doesn't want to
look like a punk in front of the cops?

23 A. Yes, ma'am, Mr. Brock.

24 Q. Did you say he didn't want to look like a punk in front of
25 anyone else?

26 A. Yes, ma'am. I asked if he notified the office of any of this.
And he replied with he does not want to look like a punk in front of the
27 staff.

28 Q. Did he tell you how long he had been dealing with the noise
issue?

1 A. No history with the tenant. He didn't identify if it was just that
2 day, is that what you're asking?

3 Q. Right.

4 A. Yes, ma'am.

5 Q. Okay. Did you ask him if he had ever notified the office?

6 A. Yes, ma'am.

7 Q. And he indicated he did not?

8 A. No.

9 Q. At some point, did he calm down?

10 A. Yes. At that point I [inaudible], so I recommended one of the
11 two parties move to a separate part of the location complex. He replied
12 with he does not feel he should move.

13 Q. So at that point did he get frustrated or upset with you?

14 A. Yes, ma'am

15 Q. And what did you tell him next?

16 A. Because he wouldn't stop repeating himself, I said, "Okay, I'll
17 recommend [redacted], Mr. Belt, relocate to another apartment."

18 Q. Okay. And did that appease the Defendant?

19 A. Yes, ma'am. He was content at that point.

20 Q. And did your conversation with him end at that point?

21 A. Yes, ma'am. I said, "If any further, just call my extension,
22 we'll"—that's it. Just walked away.

23 Q. Okay. And did he seem calm at that point?

24 A. Yes, ma'am.

25 Trial Transcript, Exh. 22 (day 2), pp. 38–41 (ECF No. 19-1, pp. 39–42). Then, on a re-
26 cross examination, Brock's counsel asked Carbone about that conversation, as follows:

27 Q. Now, you—you said that he repeated himself several times
28 when you spoke to him about the slamming of the door incident?

A. At 6:38 p.m., yes, sir.

Q. Did he seem joyous then?

1 A. No, sir.

2 *Id.* at 59 (ECF No. 19-1, p. 60). And then, on the prosecutor's further redirect
3 examination of Carbone, the following exchange occurred:

4 Q. When he was repeating himself earlier at that earlier
5 confrontation, what did he keep repeating?

6 A. Something about being a military law enforcement
7 professional, his tattoos, *something about gang member*. It was hard to
8 identify.

9 Q. Is it fair to say he wanted to make sure you knew he had
10 prior military experience?

11 A. That had nothing to do with why he called me, but.

12 Q. Right. But is that what happened?

13 A. He just kept repeating himself, yes, but.

14 Q. About how many times do you think he told you he had prior
15 military or law enforcement experience?

16 A: Within a half an hour, it was more than I can count, so.

17 *Id.* at 60 (ECF No. 19-1, p. 61) (emphasis added). It is the witness's unsolicited
18 statement, "something about a gang member," that Brock claims his trial counsel should
19 have objected to or requested instruction to the jury regarding, and his appellate
20 counsel should have raised on appeal.

21 Brock asserted this claim on the appeal in his state habeas action. *See*
22 Appellant's Opening Brief, Exh. 92, pp. 43–45 (ECF No. 24-1, pp. 53–55). The Nevada
23 Supreme Court ruled as follows:

24 ... Brock argues that trial and appellate counsel should have
25 challenged improper character evidence and requested a limiting
26 instruction. We disagree. The State elicited testimony about Brock's
27 statements to a security officer in response to defense questioning about
28 how Brock spoke to the security officer after his initial argument with the
victim. *See State v. Gomes*, 112 Nev. 1473, 1480, 930 P.2d 701, 706
(1996) (providing that error in admitting evidence was not reversible where
defense invited the error). Moreover, it was not clearly indicative that the
statement made by Brock to this witness indicated any prior bad act or
unfavorable character evidence about Brock. Therefore, the district court
did not err in denying this claim.

Order of Affirmance, Exh. 95, pp. 4–5 (ECF No. 24-4, pp. 5–6).

1 The Court finds the Nevada Supreme Court's ruling to be reasonable. The
 2 witness's testimony that Brock said "something about gang member" was so vague as
 3 to be meaningless. The witness did not indicate who Brock said was a gang member.
 4 The witness did not say that Brock said he himself was a gang member. The witness
 5 did not specify what gang, or even what kind of gang, was referred to. The witness did
 6 not testify that Brock admitted to committing any prior crime or bad act. The witness did
 7 not say that Brock's statement, "something about gang member," indicated bad
 8 character on Brock's part. The statement by the witness was too brief and vague to
 9 support any determination that Brock's trial or appellate counsel performed deficiently in
 10 not taking any action regarding it. And, at any rate, the statement by the witness was
 11 too brief and vague for Brock to satisfy the second prong of the *Strickland* analysis by
 12 showing that he was prejudiced by either trial or appellate counsel's failure to take any
 13 action regarding it. Brock has not shown the Nevada Supreme Court's ruling to be
 14 contrary to, or an unreasonable application of, *Strickland*. The Court will deny Brock
 15 habeas corpus relief on Ground 7.

16 **I. Ground 8**

17 In Ground 8, Brock claims that his federal constitutional rights were violated on
 18 account of ineffective assistance of his trial and appellate counsel because of trial
 19 counsel's "failure to object" and appellate counsel's failure "to raise on appeal the
 20 district court's giving of improper jury instructions." Petition for Writ of Habeas Corpus
 21 (ECF No. 25), pp. 42–46.

22 **1. Ground 8A - The Malice Instruction**

23 Brock claims that his trial and appellate counsel were ineffective for failing to
 24 challenge the following jury instruction:

25 Express malice is that deliberate intention unlawfully to take away
 26 the life of a fellow creature, which is manifested by external circumstances
 capable of proof.

27 Malice may be implied when no considerable provocation appears,
 28 or when all the circumstances of the killing show an abandoned and
 malignant heart.

1 See Petition for Writ of Habeas Corpus (ECF No. 25), pp. 42–44; Jury Instruction No. 7,
 2 Exh. 25 (ECF No. 20-3, p. 8). More specifically, Brock claims that his trial and appellate
 3 counsel should have argued that the phrase “abandoned and malignant heart” is vague.
 4 See Petition for Writ of Habeas Corpus (ECF No. 25), pp. 42–44.

5 The Nevada Supreme Court rejected this claim, citing *Leonard v. State*, 117 Nev.
 6 53, 78–79, 17 P.3d 397, 413 (2001). Order of Affirmance, Exh. 95, p. 5 (ECF No. 24-4,
 7 p. 6). In *Leonard*, in 2001, the Nevada Supreme Court held as follows regarding the
 8 argument that Brock makes in this case:

9 ... Leonard also claims that the instructions were insufficient to
 10 define malice. Leonard specifically asserts that the implied malice
 11 instruction contains language “so vague and pejorative that [it] is
 12 meaningless without further definition, and it should have been eliminated
 13 in favor of less archaic terms which define the conscious disregard for life
 14 from which malice may be implied.” Leonard notes that the California
 Supreme Court has criticized similar language defining implied malice in
 California’s own statute. See, e.g., *People v. Phillips*, 64 Cal.2d 574, 51
 Cal.Rptr. 225, 414 P.2d 353, 363–64 (1966), *overruled on other grounds*
 by *People v. Flood*, 18 Cal.4th 470, 76 Cal.Rptr.2d 180, 957 P.2d 869,
 882 n. 12 (1998); Cal.Penal Code § 188 (West 1999).

15 However, the statutory language is well established in Nevada, and
 16 we conclude that the malice instructions as a whole were sufficient. This
 17 court has characterized the statutory language “abandoned and malignant
 18 heart” as “archaic but essential.” *Keys v. State*, 104 Nev. 736, 740, 766
 19 P.2d 270, 272 (1988). This court held that similar instructions “accurately
 20 informed the jury of the distinction between express malice and implied
 21 malice.” *Guy v. State*, 108 Nev. 770, 777 & n. 2, 839 P.2d 578, 582–83 &
 22 n. 2 (1992). Further, this court has held that language in the malice
 23 aforethought instruction is constitutional that refers to “a heart fatally bent
 24 on mischief” and acts done “in contradistinction to accident or mischance.”
 See *Leonard*, 114 Nev. at 1208, 969 P.2d at 296. This court concluded
 that “[a]lthough these phrases are not common in today’s general
 parlance, ... their use did not deprive appellant of a fair trial.” *Id.* Absent
 some indication that the jury was confused by the malice instructions
 (including the instruction on malice aforethought and express malice), a
 defendant’s claim that the instructions were confusing is merely
 “speculative.” See *Guy*, 108 Nev. at 777, 839 P.2d at 583. Leonard has
 not shown that the jury was confused in the instant case.

25 *Leonard*, 117 Nev. at 78–79, 17 P.3d at 413. Plainly then, to the extent Brock’s position
 26 is that his counsel should have challenged the instruction under state law, his claim is
 27 foreclosed by Nevada Supreme Court precedent. And, beyond that, Brock does not
 28 make any argument that his counsel should have challenged the instruction under

1 federal law, much less that the instruction was invalid under United States Supreme
2 Court precedent. See Petition for Writ of Habeas Corpus (ECF No. 25), pp. 42–44.

3 Because Brock does not identify any legitimate challenge that either his trial
4 counsel or his appellate counsel could have posed to the malice instruction, he does not
5 show that either performed deficiently or that he was prejudiced. The Nevada Supreme
6 Court’s ruling on this claim was not contrary to, or an unreasonable application of,
7 *Strickland*, or any other Supreme Court precedent. The Court will deny Brock habeas
8 corpus relief on Ground 8A.

9 **2. Ground 8B - The Premeditation and Deliberation Instruction**

10 Brock claims that his trial and appellate counsel were ineffective for failing to
11 challenge the following jury instruction:

12 Premeditation is a design, a determination to kill, distinctly formed
13 in the mind by the time of the killing.

14 Premeditation need not be for a day, an hour, or even a minute. It
15 may be as instantaneous as successive thoughts of the mind. For if the
16 jury believes from the evidence that the act constituting the killing has
been preceded by and has been the result of premeditation, no matter
how rapidly the act follows the premeditation, it is premeditated.

17 See Petition for Writ of Habeas Corpus (ECF No. 25), pp. 44–45; Jury Instruction No. 8,
18 Exh. 25 (ECF No. 20-3, p. 9). Brock argues that “[b]y approving the concept of
19 ‘instantaneous’ premeditation and deliberation, the giving of this instruction created a
20 reasonable likelihood that the jury would convict and sentence on a charge of first
21 degree murder without any rational basis for distinguishing its verdict from one of
22 second degree murder, and without proof beyond a reasonable doubt of “premeditation
23 and deliberation,” which are statutory elements of first degree murder.” Petition for Writ
24 of Habeas Corpus (ECF No. 25), p. 44.

25 This claim is wholly without merit. Brock was convicted of second-degree murder,
26 not first-degree murder. Even if this instruction was erroneous—and this Court does not
27 find that it was—Brock was not prejudiced by his counsel’s failure to challenge it. The
28 Nevada Supreme Court’s denial of relief on this claim was not contrary to, or an

unreasonable application of, *Strickland*, or any other Supreme Court precedent. The Court will deny Brock habeas corpus relief on Ground 8B.

3. Ground 8C - The Reasonable Doubt Instruction

Brock claims that his trial and appellate counsel were ineffective for failing to challenge the following jury instruction:

A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

See Petition for Writ of Habeas Corpus (ECF No. 25), pp. 45–46; Jury Instruction No. 31, Exh. 25 (ECF No. 20-3, p. 32). Brock’s argument that this instruction was objectionable is, in its entirety, as follows:

The trial court’s reasonable doubt instruction given improperly minimized the State’s burden of proof.

* * *

The instruction given to the jury minimized the State’s burden of proof by including terms “It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life” and “Doubt, to be reasonable, must be actual, not mere possibility or speculation.” This instruction inflates the constitutional standard of doubt necessary for acquittal, and the giving of this instruction created a reasonable likelihood that the jury would convict and sentence based on a lesser standard of proof than the constitution requires. See *Victor v. Nebraska*, 511 U.S. 1, 24 (1994) (Ginsburg, J., concurring in part); *Cage v. Louisiana*, 498 U.S. 39, 41 (1990); *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). Mr. Brock recognizes that the Nevada Supreme Court has found this instruction to be permissible. See e.g. *Elvik v. State*, 114 Nev. 883, 985 P.2d 784 (1998); *Bolin v. State*, 114 Nev. 503, 960 P.2d 784 (1998). However, Mr. Brock submits this instruction is in violation of clearly established federal law and mandates reversal.

Petition for Writ of Habeas Corpus (ECF No. 25), pp. 45–46.

Brock’s citations to *Victor*, *Cage*, and *Estelle* do not show Nevada’s reasonable doubt instruction to be erroneous as a matter of federal law. In *Victor*, the Supreme Court held constitutional a reasonable doubt instruction, and there is nothing in the opinion suggesting that the language of the Nevada reasonable doubt instruction

renders it unconstitutional. See *Victor*, 511 U.S. at 10–23. In *Cage*, the Supreme Court ruled unconstitutional a reasonable doubt instruction, but that instruction was different from the instruction in this case; the instruction at issue in *Cage* equated a reasonable doubt with “a ‘grave uncertainty’ and an ‘actual substantial doubt.’” See *Cage*, 298 U.S. at 41 (“It is plain to us that the words ‘substantial’ and ‘grave,’ as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable-doubt standard.”). *Estelle* did not involve a reasonable doubt instruction at all. See *Estelle*, 502 U.S. at 70–75. Brock does not explain how the reasonable doubt instruction given at his trial was inconsistent with the holding in any of those Supreme Court cases.

Moreover, the Ninth Circuit Court of Appeals has ruled constitutional a reasonable doubt instruction similar to that given at Brock’s trial. *Ramirez v. Hatcher*, 136 F.3d 1209, 1213–15 (9th Cir. 1998), *cert. denied*, 525 U.S. 967 (1998). Furthermore, the Ninth Circuit Court of Appeals has ruled that this issue is not worthy of a certificate of appealability. *Nevius v. McDaniel*, 218 F.3d 940, 944–45 (9th Cir. 2000) (“That claim has been entirely undermined by our subsequent decision in [*Ramirez*].”). Counsel’s “[f]ailure to raise a meritless argument does not constitute ineffective assistance.” *Martinez v. Ryan*, 926 F.3d 1215, 1226 (9th Cir. 2019) (quoting *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985)).

The Nevada Supreme Court’s ruling on this claim was not contrary to, or an unreasonable application of, *Strickland*, *Victor*, *Cage*, *Estelle*, or any other Supreme Court precedent. The Court will deny Brock habeas corpus relief on Ground 8C.

4. Ground 8D - The Equal and Exact Justice Instruction

Brock claims that his trial and appellate counsel were ineffective for failing to challenge the following jury instruction:

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it

1 to be and by the law as given to you in these instructions, with the sole,
 2 fixed and steadfast purpose of doing equal and exact justice between the
 Defendant and the State of Nevada.

3 See Petition for Writ of Habeas Corpus (ECF No. 25), p. 46; Jury Instruction No. 38,
 4 Exh. 25 (ECF No. 20-3, p. 39). Brock's entire argument that this instruction is
 5 objectionable is as follows:

6 The trial court's "equal and exact justice" instruction improperly
 7 minimized the State's burden of proof.

8 * * *

9 By informing the jury that it must provide equal and exact justice
 10 between the defendant and the State, this instruction created a
 11 reasonable likelihood that the jury would not apply the presumption of
 innocence in favor of Mr. Brock, and would thereby convict and sentence
 based on [a] lesser standard of proof than the constitution requires.
Sullivan v. Louisiana, 508 U.S. 275, 281 (1993).

12 Petition for Writ of Habeas Corpus (ECF No. 25), p. 46.

13 As far as state law goes, Brock's argument that the equal and exact justice
 14 instruction was erroneous is foreclosed by the Nevada Supreme Court's ruling in
 15 *Leonard v. State*, 114 Nev. 1196, 969 P.2d 288 (1998), in which that court held:

16 Appellant contends that the district court denied him the
 17 presumption of innocence by instructing the jury to do "equal and exact
 18 justice between the Defendant and the State of Nevada." This instruction
 19 does not concern the presumption of innocence or burden of proof. A
 20 separate instruction informed the jury that the defendant is presumed
 innocent until the contrary is proven and that the state has the burden of
 proving beyond a reasonable doubt every material element of the crime
 and that the defendant is the person who committed the offense. Appellant
 was not denied the presumption of innocence.

21 *Leonard*, 114 Nev. at 1209, 969 P.2d at 296. And, with regard to federal law, Brock
 22 does not make any showing that the equal and exact justice instruction was in conflict
 23 with clearly established federal law. The *Sullivan* case, cited by Brock, did not involve
 24 an equal and exact justice instruction; rather, *Sullivan* stands for the proposition that a
 25 constitutionally deficient reasonable doubt instruction—a reasonable doubt instruction
 26 essentially identical to the one given in *Cage*—cannot be harmless error because it
 27 vitiates all the jury's findings. See *Sullivan*, 508 U.S. at 277–82. Brock does not show
 28 the Nevada Supreme Court's ruling on this claim to be inconsistent with *Sullivan*.

1 Brock's trial and appellate counsel did not perform deficiently for not challenging
 2 this jury instruction, and Brock was not prejudiced. The Nevada Supreme Court's ruling
 3 on this claim was not contrary to, or an unreasonable application of, *Strickland*, *Sullivan*,
 4 or any other Supreme Court precedent. The Court will deny Brock habeas corpus relief
 5 on Ground 8D.

6 **J. Ground 9**

7 In Ground 9, Brock claims that he "is entitled to a reversal of his convictions
 8 based upon cumulative error." Petition for Writ of Habeas Corpus (ECF No. 25), pp. 46–
 9 47. The Court finds no error, and, therefore, there are no errors to be considered
 10 cumulatively. Moreover, with regard to Brock's claims of ineffective assistance of
 11 counsel, the Court determines that Brock does not meet the prejudice part of the
 12 *Strickland* standard, that is, he was not prejudiced by the alleged deficient performance
 13 of his attorneys, whether the alleged errors of his counsel are considered individually or
 14 cumulatively. The Court will deny Brock habeas corpus relief on Ground 9.

15 **K. Certificate of Appealability**

16 The standard for the issuance of a certificate of appealability requires a
 17 "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c). The
 18 Supreme Court has interpreted 28 U.S.C. § 2253(c) as follows:

19 Where a district court has rejected the constitutional claims on the
 20 merits, the showing required to satisfy § 2253(c) is straightforward: The
 21 petitioner must demonstrate that reasonable jurists would find the district
 court's assessment of the constitutional claims debatable or wrong.

22 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also James v. Giles*, 221 F.3d 1074,
 23 1077–79 (9th Cir. 2000). Applying the standard articulated in *Slack*, the Court finds that
 24 a certificate of appealability is unwarranted.

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1 **IV. CONCLUSION**

2 **IT IS THEREFORE ORDERED** that the Petition for Writ of Habeas Corpus (ECF
3 No. 1) is denied.

4 **IT IS THEREFORE ORDERED** that Petitioner is denied a certificate of
5 appealability.

6 **IT IS FURTHER ORDERED** that the Clerk of the Court is directed to enter
7 judgment accordingly.

8
9 DATED THIS 1st day February, 2022.

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11 
12 LARRY R. HICKS
13 UNITED STATES DISTRICT JUDGE
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